SUPREME COURT, U.S.

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1911

MICHAEL EDWARD CHASE,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI

EMMETT COLVIN,
1100 Adolphus Tower,
Dallas, Texas 75202,
Attorney for Petitioner.

In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. .....

MICHAEL EDWARD CHASE,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Court of Criminal Appeals of Texas

The Petitioner, Michael Edward Chase, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of Texas entered in this proceeding on January 16, 1974.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals, not yet reported, appears in the Appendix hereto. No opinion was, of course, rendered by the Texas Trial Court, Criminal District Court No. 3 of Dallas County, Texas.

JURISDICTION

The judgment of the Texas Court of Criminal Appeals was entered January 16, 1974. A timely Motion for Rehearing was denied without written opinion on May 15, 1974. A copy of such notification appears in the appendix hereto. This Petition was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1257 (3).

QUESTION PRESENTED

1. Whether it is a violation of Petitioner's rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States for State Officers acting under the authority of a search warrant to search and explore a residence for matters beyond the scope of the warrant.

CONSTITUTIONAL PROVISIONS INVOLVED

ARTICLE IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE XIV: Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioner was convicted for the offense of murder, his penalty being assessed at life in the Texas Department of Corrections. Critical to the conviction in this case was the admission into evidence of an oral confession of the Petitioner, the admissibility of which turned upon a construction of Article 38.22, Section 1(e), Texas Code of Criminal Procedure, which requires that before an oral confession is admissible in Texas such statement or circumstances must be found to be true by evidence corroborating such statement through the finding of evidence to support the same. Through the oral statement, the police reportedly learned of the involvement of a certain plywood board, a certain rope, and a weapon used in the killing. Since oral confessions or statements made by a defendant are not admissible unless in writing in Texas, or unless corroborated under the provisions of Article 38.22, the law enforcement officers obtained a search warrant for the residence of the Petitioner for the expressed purpose of searching for the remainder of the rope. The rope described in the search warrant was three-quarters of an inch in diameter and fifteen to eighteen feet in length. In executing the search warrant, however, the officers took the plywood board in question to the house, penetrated the wall with matching screws, attached chains, and photographed the "fitting" for the purpose of gathering evidence against the Petitioner to admit such evidence in Court, which was done, to corroborate the Petitioner's oral confession. The rope designated in the warrant was not found at the residence. As reflected by the opinion of the Texas Court of Criminal Appeals, at Page 10, the Court ruled that the taking of the photographs did not constitute a search

and seizure, ignoring the fact that the photographs themselves were the product of a search and exploration beyond the scope of the search warrant. On May 15, 1974, the Texas Court of Criminal Appeals overruled without written opinion Petitioner's Motion for Rehearing, wherein Petitioner reurged the precise question presented here.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with this Court's decision in *Marron v. United States*, 275 U.S., 192.

It is emphasized that this is not a case where law enforcement officers in the course of the lawful search observed contraband, criminal activity, or criminal evidence in plain view. To say, as the Texas Appellate Court said, that the taking of the photographs did not constitute a search and seizure merely begs the question. The photographs were in fact the product of an illegal search and an illegal execution of the search warrant. The fundamental error of the Texas Appellate Court begins when it states, "* * * the warrant did not restrict the portion of Appellant's home they were to search. Under such a misconception, for example, an officer could look for a television set specified in a search warrant in a small jewelry box. Generally, a warrant does so restrict the search depending upon the thing directed to be searched for in the warrant. One cannot, of course, search for an elephant in a bureau drawer. The warrant is valid only as directing the officer to search in those places where the object described may be found. By no stretch of the imagination can it be said that the placing of screws in the screwholes in the wall of the residence and then proceeding with the "fitting", that such officers were searching for a rope three-quarters of an inch in diameter and fifteen to eighteen feet in length. It is obvious that the police officers were using the search warrant as a ruse to accomplish an exploratory search of the premises not encompassed within the warrant. The officers, contrary to the statement by the Texas Appellate Court, were unable to observe the wall in such al-

tered condition until such time as they exceeded the authority contained in the warrant. As stated in *United States v. Rabinowitz*, 339 U. S. 5, 6, "Exploratory searches * * * cannot be undertaken by officers with or without a warrant." As stated by Mr. Justice Stewart in *Stanley v. Georgia*, 394 U. S. 557, 572, "This record presents a bald violation of that basic constitutional rule. To condone what happened here is to invite a government official to use a seemingly precise and legal warrant only as a ticket to get into a man's home, and, once inside, to launch forth upon unconfined searches and indiscriminant seizures as if armed with all the unbridled power of a general warrant." One would gain the impression from a reading of the Texas Appellate Court Opinion that, assuming a valid warrant, Officers can use a warrant to do anything on the premises they may desire to do. This, of course, has no constitutional or statutory support in any jurisdiction, federal or state. Basic principles are necessary for consideration. Whatever power an official has in executing a warrant is contained within that instrument itself. The officer may not substitute his own judgment for that of the judicial officer who issued the writ, nor may he depart from the instructions set forth in the writ. He is required to obey the directions in a ministerial or administrative capacity as to the place to be searched, the property to be seized and the person to be arrested. *Marron v. United States*, 275 U. S. 192, 196; quoted in *Stanley v. Georgia*, 394 U. S. 557, at 571. In *Stanley*, the State and Federal officers gained admission to the appellant's home under the authority of a search warrant describing the place to be searched with particularity and the things to be seized, namely, equipment, records, and other material used in or derived from an illegal wagering business. The agents in *Stanley* were lawfully present in the appellant's house and lawfully were authorized to search for any and all of the items specified in the warrant and in so acting, they were authorized to pull open the drawers in his desk. But, however, when in one of those drawers they found moving picture film, the warrant gave these officers no authority to seize the films, to project them, and make a determination

that such films were obscene. In *Stanley*, the contents of the film could not be determined by mere inspection, the agents spending some fifty minutes exhibiting them by means of appellant's project or in another upstairs room. In this case, it is true there was nothing to prohibit the officers from viewing the wall in question by mere inspection but, as the Texas Appellate Court knew, the officers went further than that by penetrating the wall with screws wherein no such length or diameter of rope could be found and effecting the "fitting" of the plywood board to the wall and, in so doing, the officers in a Constitutional sense exceeded the authority set forth in the search warrant.

It is not conceivable that such Constitutional violation could be determined harmless, for without such photographic evidence of the "fitting" of the large plywood board to the place where it was apparently formerly attached to the wall, could it be said that the corroboration necessary to make the critical oral confession admissible, to attach guilt, could be found.

To avoid confusion, it is emphasized that there were two searches of the residence of the Petitioner on separate occasions, September, 1970, without a search warrant, and October, 1970, with the search warrant herein in question. It is the latter search that is under attack here.

2. The decision below raises significant problems concerning appellate procedure wherein an appellant may be denied a definitive decision on significant Constitutional questions.

Petitioner was faced below with the not too infrequent frustrating tactic of an appellate court building its own straw man to destroy, thereby avoiding facing up to the Constitional issue involved. The novice lawyer could not disagree that "the warrant did not restrict the portion of appellant's (Petitioner's) home they were to search", though even he would readily disagree that one could search and explore at and in places where the thing to be searched for as di-

rected by the warrant could not be found — unless we assume the ridiculous — that an eighteen foot rope could be found by placing screws in the screwholes in the wall. It is the latter that is camouflaged by Hornbook cliches. Nor could one quarrel with the cliche that the taking of photographs of the observable is not a search per se, if we ignore the search and exploration that preceeded the taking of the photographs for the purpose of altering and changing the observable. This straw man approach in plain effect denies the right to meaningful appeal to this Petitioner.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Texas Court of Criminal Appeals.

Respectfully submitted,

EMMETT COLVIN,
1100 Adolphus Tower,
Dallas, Texas 75202,
Attorney for Petitioner.

CERTIFICATE OF SERVICE

I hereby certify that on this the day of June, 1974, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Honorable John Hill, Attorney General for the State of Texas, Supreme Court Building, Austin, Texas. I further certify that all parties required to be served have been served.

EMMETT COLVIN,
1100 Adolphus Tower,
Dallas, Texas 75202,
Attorney for Petitioner.

APPENDIX

No. 46,796

Appeal from Dallas County

MICHAEL EDWARD CHASE

Appellant,

v.

THE STATE OF TEXAS

Appellee.

OPINION

Appeal is taken from a conviction for murder. Penalty was assessed by the jury at life.

While the sufficiency of the evidence is not challenged, a brief recitation of the events which give rise to appellant's grounds of error is deemed necessary in order that appellant's contentions may be discussed with greater clarity.

Appellant, a seventeen-year-old high school student, lived with his parents in Dallas.

The appellant and the deceased, a schoolmate, attended a party on the night of August 21, 1970. The deceased was to spend the night with appellant and they left the party together. Appellant's parents were away from home for the night.

On August 24, 1970, the body of the deceased was found on the bank of the Trinity River. The body was encased in a green sleeping bag. A large rope was bound around the body.

Appellant gave officers a written statement on September 4, 1970, that deceased had been at his home on the night of August 21, 1970.

On September 10, 1970, at a time when the State contends that its investigation had not focused on appellant, a search was made of appellant's home without a warrant.

On September 14, 1970, an arrest warrant issued and appellant was taken into custody. A short time after his arrest, appellant made an oral confession to officers.

On October 7, 1970, a search warrant was obtained and appellant's home was searched for the second time.

At the outset appellant contends that the trial court lacked jurisdiction over the appellant in that Article 2338-1, V.A.C.S., denied the appellant the equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States in establishing a different age requirement for conferring juvenile jurisdiction for males than females.

Appellant, a seventeen-year-old male at the time of the alleged offense on August 22, 1970, urges that had he been a female rather than a male, the applicable law[1] at the time in question would have required that the case pending against him be transferred to the juvenile court.

This court's decision in Ex Parte Matthews, 488 S.W. 2d 434, is dispositive of appellant's contention. While Ex Parte Matthews, supra, held that the disparity in the age classification between males and females was unconstitutional, this court went on to hold that every person was amenable to punishment under the Penal Code (Article 29, V.A.P.C.) except persons under the age of fifteen (Article 30, Section 1, V.A.P.C.) after exercising the seventeen-eighteen-year-old classification from Article 2338-1, V.A.C.S., and Article 30, V.A.P.C. Thus, the court had jurisdiction of appellant in the instant case. See Hill v. State, ... S.W. 2d ..... (No. 46,760, 1-9-74).

Appellant contends that the court erred in admitting an oral confession in that such confession did not comply with the requirements of Article 38.22, Section 1(e), V.A.C.C.P.

[1] Prior to November 1, 1972, Article 2338-1, Section 3, V.A.C.S., established the age requirements that placed a person within the jurisdiction of the juvenile court by defining "child" to mean any female person over the age of ten years and under the age of eighteen years and any male person over the age of ten years and under the age of seventeen years.

Effective November 1, 1972, Article 2338-1, Section 3, V.A.C.S., was amended defining the word "child" to mean any person over the ages of ten years and under the age of seventeen years.

Appellant urges that while his oral confession may have been explanatory it did not lead to any of the instrumentalities of the crime and is therefore inadmissible.

The pertinent portion of Article 38.22, V.A.C.C.P., provides:

> "1. The oral or written confession of a defendant made while the defendant was in jail or other place of confinement or in the custody of an officer shall be admissible if:
>
> "...
>
> "(e) It be made orally and the defendant makes a statement of facts and circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, or the instrument with which he states the offense was committed."

Pursuant to an arrest warrant, appellant was taken into custody on September 14, 1970. After being arrested at the school he was attending, officers read appellant the "Miranda" warnings and, according to the officers, appellant stated he understood them. After entering the squad car, appellant made an oral confession in which he stated that a bayonet was the murder weapon; that a rope was taken from the carport at appellant's home which was used to bind the deceased; that the plywood board found with the body was a table top that came from his younger brother's room and that the sleeping bag the body was found in belonged to a friend.

After arrival at the sheriffs' office, appellant was taken before a justice of the peace and from there to an interview room where the oral confession continued. Appellant stated that he and the deceased went to appellant's home after a party. According to Officer Williamson, appellant related that he and the deceased had an argument, but appellant would not talk about the incident surrounding the death of the deceased. Appellant stated that when he awakened the next morning, he found the deceased lying on the floor; that appellant went to the carport and got a sleeping bag

and the rope and after placing the deceased in the sleeping bag he dragged the body to a tin shed behind the house.

Later, appellant returned to the shed, placed the deceased in the bed of a pickup, covered the body with a piece of plyboard and drove to the river. Upon arrival at the river, appellant placed the deceased on the plyboard and dragged deceased to the water. After deceased was placed in the water, appellant put the plyboard over him.

Appellant argues that the officers already had all of the instrumentalities of the crime in their possession and nothing was recovered as a result of the oral confession. The sleeping bag and the plyboard were found with the body. A piece of rope and the bayonet were recovered in the officers' search of appellant's home on September 10, 1970.

In Ashley v. State, 362 S.W. 2d 847, cert. denied 372 U.S. 956, defendant contended that no proper predicate had been laid authorizing the admission of an oral statement because the officers already had the deceased's automobile in their possession. After defendant's arrest, defendant's purse was emptied on a desk and defendant stated that keys emptied therefrom belonged to deceased's automobile. The keys were subsequently determined to fit deceased's automobile. This court found that such evidence was sufficient to show that the automobile had been under the control and in the possession of the defendant. The court went on to hold that the oral statement made at the time defendant identified the keys as belonging to deceased's vehicle was, under the facts and circumstances of the case, authorized to be admitted ino evidence.

In Valtiero v. State, 219 S.W. 2d 73, where a hat belonging to the victim was discovered by following the defendant's directions, this court said:

> "The facts here present demonstrate that facts and circumstances may be stated by an accused which unquestionably are inculpatory and conduce to establish his guilt, and yet neither lead to the recovery of stolen property, or the instrument with which the offense was committed."

The facts found to be true must be incriminating. Shelton v. State, 328 S.W. 2d 445. When the facts or circumstances asserted have not led to the discovery of items or information previously unknown to the State, confessions have been held inadmissible. Taggart v. State, 191 S.W. 2d 728; Willoughby v. State, 219 S.W. 468; Baggett v. State, 144 S.W. 1136. When, however, the statement of the accused has led to the discovery of items or information not theretofore discovered by the State, the "found to be true" requirement of Article 38.22, Section 1, V.A.C.C.P., has been satisfied. Wilson v. State, 473 S.W. 2d 532 (recovery of stolen vehicle); Ashley v. State, supra (identification of keys in defendant's possession); Stelman v. State, 58 S.W. 2d 831 (location of victim and victim's wound); Sweat v. State, 29 S.W. 2d 756 (location of burglary and identification of stolen property); Williams v. State, 27 S.W. 2d 233 (location of murder).

The foregoing authorities dictate that Article 38.22, Section 1(e), V.A.C.C.P., requires that some evidence be found as a result of the defendant's statement which bolsters the reliability of the facts and circumstances in the statement that conduce to establish guilt.

In appellant's oral statement to the officers the plyboard which was found with deceased's body was described by appellant as having come from his brother's room; that it was a table top and the hinges on the board supported it against the wall; and the metal eye hooks on the board were hooked to chains. When the officers went to appellant's home on October 7, the plyboard was taken to appellant's brother's room. The plyboard was found to fit up to the wall with chains fastened thereto just as appellant had described in his oral confession. Photographs were taken of the plyboard attached to the wall and introduced into evidence.

The information obtained from appellant and confirmed by the officers taking the plyboard to appellant's home is like the identification and determination of the origin of the keys in Ashley v. State, supra. The origin of the plyboard was unknown to the officers prior to appellant's statement

and the determination of the truth of such statement conduced to establish appellant's guilt. Under these facts and circumstances, the appellant's oral statement was authorized to be admitted into evidence.

Appellant next contends that his oral confession was inadmissible in that there was no showing that the arrest warrant was based on probable cause.

The record reflects that the court granted appellant's motion to discover the warrant of arrest for appellant and the affidavit in support thereof.

The sole thrust of appellant's argument is that the State failed to establish, after due objection, that the arrest warrant was based on probable cause and therefore the oral confession should have been suppressed.

In support of his contention, appellant points to the testimony of Officer Williamson:

> "Q. . . . I will ask you if you were present when Mr. Oxford of the Dallas Sheriff's office swore out an affidavit charging Michael Edward Chase with the murder of Reuel Dean Hanks?
>
> "A. I was.
>
> "Q. All right. I will ask you as a result of the affidavit that was filed in support of his accusation if an arrest warrant was issued.
>
> "A. It was."

Appellant calls our attention to another place in the record where the same information was elicited from Williamson and due to the fact that the testimony does not vary in any material respect it will not be repeated.

The trial court, in its findings of fact and conclusions of law in overruling appellant's motion to suppress the oral confession, found (among other findings) ". . . there is no evidence to show that the affidavit upon which the arrest warrant is founded contains warrants sufficient to qualify

as probable cause to issue the said warrant. The court further finds that the detention of the defendant, Michael Edward Chase, was in fact lawful despite the defective arrest occurring at its inception."

In Lacefield v. State, 412 S.W. 2d 906[2], it was held that a confession otherwise shown to have been voluntary is not rendered inadmissible by the fact that the accused was under arrest or in custody at the time, even though the arrest may have been under invalid process or without any process or legal right. See De Leon v. State, 466 S.W. 2d 573; Randolph v. State, 493 S.W. 2d 869. Appellant does not claim nor does the record reflect that the statement was not voluntary. It is not disputed that appellant was properly warned before making the oral statement. The evidence supports the court's finding that there was ample reason to detain appellant and that his detention did not vitiate the confession. The record does not demonstrate, nor is it contended that appellant was held incommunicado for an extended period of time, denied food or drink or critically deprived of his capacity for self-determination. Coercion has not been urged or established.

We hold that the trial court's findings that the oral confession was admissible are supported by the evidence.

Appellant next contends that evidence was seized on October 1 at appellant's home pursuant to search warrant which was based upon an affidavit which failed to show probable cause.

The search warrant and affidavit are in the record and are, therefore, properly before the court for review. The affiant, Officer Oxford, recites in the affidavit that he was in appellant's home on September 10, 1970, in connection with the investigation of the death of the deceased and

[2] In Lacefield v. State, supra, this court, speaking through now Presiding Judge Onion, pointed out that state and federal courts have had occasion to pass on the contention that a confession following an illegal arrest is ipso facto inadmissible under Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441, and that such contention has been generally rejected. See numerous federal and state cases cited in Lacefield v. State, supra.

while there observed a hemp rope approximately ¾ inch in diameter and 15 to 18 feet in length. The affidavit further sets out the warning given appellant before he made an oral statement on September 14, 1970, in the presence of affiant and then states: "He [appellant] then stated that the above rope was used by him in connection with the murder of Reuel Hanks." Affiant concludes, "I do believe the above described rope is an instrumentality of the crime of murder and is presently located at the above described premises."

Appellant urges that the affidavit and warrant call for a search of "mere evidence" and that such a search is not authorized under Article 18.01, V.A.C.C.P.[3], the pertinent portion of which reads:

> "A 'search warrant' is a written order issued by a magistrate, and directed to a peace officer, commanding him to search for personal property and to seize the same and bring it before such magistrate; or it is a like written order, commanding a peace officer to search a suspected place where it is alleged stolen property is commonly concealed, or implements *kept for the purpose of being used* in the commission of any designated offense."

Appellant argues that since the crime in question had already been committed the rope from which a piece was used to dispose of the body of the deceased was not an implement "kept for the purpose of being used in the commission of any designated offense."

Under the narrow construction of Article 18.01, V.A.C.C.P., urged by appellant, officers would be precluded from obtaining a search warrant for a bottle of poison from which a fatal dose was administered. Such a strict construction of Article 18.01 is not in harmony with Article 1.26, V.A.C.C.P., providing:

> "The provisions of this Code shall be liberally construed, so as to obtain the objects intended by the

[3] Article 18.01, V.A.C.C.P., "Search Warrant," and Article 18.02, V.A.C.C.P., "Grounds for Issuance," were amended by the 63rd Legislature, effective January 1, 1974.

> Legislature: The prevention, suppression and punishment of crime."

Further, precedent does not require such an unnecessarily strict construction as urged by appellant.

In Cage v. State, 180 S.W. 2d 928, where a search warrant issued for implements used in aiding in commission of offense of keeping a policy game, this court held that a book containing social security numbers of employees of defendant seized in the search should have been excluded, saying:

> "We are at a complete loss to discover how it would be possible for a book containing social security numbers of purported employees to be used in conducting a policy game, or to be classed as an implement for such purpose."

This court in *Cagle* went on to say:

> ". . . if property was seized *which was not used or usable in committing the offense*, but was only of evidential value in establishing accused's guilt of the crime charged, such evidence should, upon objection, thereto have been excluded." (Emphasis supplied.)

The distinction between Cagle v. State, supra, and the instant case is apparent.

While records of social security numbers of defendant's employees could not be used in committing the offense of conducting a policy game, the rope from which a piece was taken to bind the deceased's body was property "used or usable in committing the offense" of murder.

We reject appellant's contention that the affidavit did not furnish probable cause for issuance of the search warrant.

Appellant contends that the officers went beyond the scope of the search warrant in placing a plyboard (found near deceased's body) against a wall in appellant's home, matching

the screw holes in the board with those on the wall, attaching chains on the wall to the board and photographing the "fitting." Pictures of the board positioned against the wall were introduced into evidence. Appellant urges that obtaining the search warrant for the rope was a "ruse" for the officers to accomplish the "fitting" of the board to the wall.

Having heretofore determined that the search warrant was valid, the officers were legally upon the premises and *the warrant did not restrict the portion of appellant's home they were to search.*

In Tocher v. State, ... S.W. 2d .... (No. 46,568, November 28, 1973), it was contended that photographs taken at the scene where a murder occurred "were not within the scope of the search warrant issued by the Justice of the Peace, since they were not 'weapons and implements' of the crime as stated in the search warrant."

As in *Tocher*, the officers were on the premises pursuant to a search warrant, the pictures taken reflect nothing more than the officers were able to observe at the scene, and there is nothing to indicate that the wall depicted was in any way obscured from the view of the officers as they conducted a search through appellant's home[4].

We conclude that the taking of the complained of pictures did not constitute a search and seizure within the meaning of the Fourth Amendment. See Tocher v. State, supra, and cases cited therein.

In his last contention appellant contends that the court erred in admitting evidence seized at appellant's home on September 10, 1970, in violation of appellant's Fourth and Fourteenth Amendment rights.

The record reflects that officers went to appellant's home on September 10, 1970. According to the officers, appellant

[4] The record reflects that the officers were unable to find the rope which was the subject of the search warrant.

was not a suspect at this time. Upon arrival at appellant's home, the officers told appellant's parents that they had come to a "dead-end" in the investigation of the deceased's death and that they wanted to see the rooms that appellant had earlier described in an affidavit given them. Officer Williamson testified that appellant's parents were very cooperative and appellant's father said "we could do anything we wanted to in the house." The officers advised appellant's parents that they would like to bring Officer Kitchen from the Crime Scene and Search Section to the house and appellant's father responded, "You can bring anyone you want to out. You can do anything you feel is necessary for the investigation." Appellant was present a portion of the time and, according to Williamson, appellant showed them through the house.

The thrust of appellant's contention is that the State has not sustained its burden of showing that a valid waiver of a constitutional right was given. In support of this contention appellant points to the fact that appellant's parents were not informed of their right to refuse the search and urges that a person must be informed that consent can be withheld before there can be a valid consent.

In Schneckloth v. Bustamonte, ... U.S. ....., 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973), as in the instant case, the party alleged to have given the consent was not advised that he had a right to refuse to consent. The United States Supreme Court said:

> "Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent." See Lowery v. State, 499 S.W. 2d 160; Cole v. State, 484 S.W. 2d 779; De Voyle v. State, 471 S.W. 2d 77.

The instant case is unlike Bumper v. North Carolina, 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968); Lowery v.

State, 499 S.W. 2d 160; Paprskar v. State, 484 S.W. 2d 731, where coercive factors were present in obtaining consent to search.

After reviewing the circumstances surrounding the giving of the consent to search, we conclude that the trial court's findings in admitting the evidence found at appellant's home on September 10, 1970, are supported by the evidence.

Arguments advanced in appellant's pro se brief have been disposed of under contentions discussed in this opinion.

Finding no reversible error, the judgment is affirmed.

Davis, Commissioner

(Delivered January 16, 1974)
Opinion Approved by the Court

APPENDIX

Court of Criminal Appeals of Texas

CLERK'S OFFICE

Austin, Texas, May 15, 1974

Dear Sir:

This is to advise that the Court has today overruled without a written opinion the appellant's Motion for Rehearing in Cause No. 46,796,

Michael Edward Chase

vs.

State of Texas.

Sincerely yours,

Glenn Haynes, Clerk

Supreme Court, U. S.
FILED
OCT 9 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 73-1911

MICHAEL EDWARD CHASE,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

On Petition for Writ of Certiorari to
The Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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SUBJECT INDEX

Page

OPINION BELOW 1

JURISDICTION 1

QUESTION PRESENTED 2

CONSTITUTIONAL PROVISIONS INVOLVED . . 2

STATEMENT OF THE CASE 2

ARGUMENT AND AUTHORITIES 2

The Securing Of The Table Top Corroboration Evidence Was Proper Under The Circumstance Existing In This Case 5

1. There Was No Search -- The Table Top-Fittings Comparison Is Sustainable Because It Was Within Plain View 5

2. If the Table Top-Fittings Comparison Be Deemed A Search, Then Such Search Was Reasonable Under The Circumstances . 5

CONCLUSION 7

CERTIFICATE OF SERVICE 8

INDEX OF AUTHORITIES

Cases	Page
Cady v. Dombrowski, ___ U.S. ___, 93 S.Ct. 2523, 2527 (1973)	7
Carroll v. United States, 276 U.S. 132, 147	7
Coolige v. New Hampshire, 403 U.S. 469 (1971)	
Harris v. United States, 390 U.S. 234 (1968)	5
Warden v. Hayden, 387 U.S. 294 (1967)	4,5
Other	
Fourth Amendment to the United States Constitution	6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 73-1911

MICHAEL EDWARD CHASE,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

* * *

On Petition for Writ of Certiorari to
The Court of Criminal Appeals

* * *

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

Petitioner seeks to review the opinion of the Court of Criminal Appeals of Texas reported at 508 S.W. 2d 605.

JURISDICTION

The formal jurisdictional requisites would seem to be satisfied; however, Respondent dispute Petitioner's contention that rights guaranteed by the United States Constitution were denied to Petitioner.

QUESTIONS PRESENTED

Whether it is constitutionally permissible for officers to verify the details of an oral confession when on a particular premises under a valid search, warrant issued to search for other evidence where the verification by observation and photographing was eminently reasonable under the circumstances.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner asserts that the Fourth, Fifth and Fourteenth Amendments to the United States Constitution are involved.

STATEMENT OF THE CASE

Petitioner was convicted in the state courts of Texas, a life sentence being imposed.

On August 21, 1971, the deceased spent the night at Petitioner's house; the parents of Petitioner were away from home at this time.

On August 24, 1971, the body of the deceased was found on a river bank encased in a sleeping bag around which a rope was bound. The body was covered by a sheet of plywood. Death had been caused by stab wounds.

Petitioner was later arrested for the murder and after being taken before a magistrate, he gave an oral statement to the interviewing officers. Petitioner related that on August 21 he and the deceased had gone to a party and then returned to Petitioner's home to spend the night. An argument

ensued but Petitioner would not further duscuss the incidents surrounding the death. Petitioner did state that he found the deceased on the floor the next morning and then placed the body in a sleeping bag and bound it with the rope. After secreting the body in a shed for a time, Petitioner placed the body in a pickup, covered it with a sheet of plywood which was used as a table in his brother's room. The body was taken to the river bank and deposited in the water at the edge of the bank. The plywood was placed over the body.

The foregoing facts were learned from Petitioner's statement. Under the law of Texas (which is unique in this respect), an oral confession is not admissible unless it is corroborated by some evidence discovered as a result of the statement. See Article 3822, Texas Code of Criminal Procedure.

To obtain corroboration, the investigation officers obtained a search warrant to look for the length of rope from which had been cut the piece used to bind the body. Probable cause to search Petitioner's home is obvious since Petitioner had related the fact of cutting the victim-tying rope from a longer piece.

When the officers executed the search warrant they also took the plywood table top with them to see if it fit into place in the room of Petitioner's brother -- possible further corroboration of Petitioner's story.

The remaining rope was not found. However, the plywood did fit the hinged and chained arrangement in the brother's room, and pictures were

of the plywood in place as a sort of hinged, hanging table. The pictures were used in evidence at Petitioner's trial.

Complaint is made here that checking out the plywood table top (which had been found covering the victim's body) and the evidential use of this corroborating factor was impermissible under the Fourth Amendment.

ARGUMENT AND AUTHORITIES

While the checking for the fit of the plywood table arrangement seems completely reasonable under the circumstances disclosed by this case, it is difficult to find a Fourth Amendment classification or pigeonhole in which to place this investigatory procedure.

Notice is first made that a search for mere evidence, as countenanced by this Court in Warden v. Hayden, 387 U.S. 294 (1967), is not authorized under the laws of Texas. (See Articles 18.02 and 18.09 of the Texas Code of Criminal Prodecure before their amendment in 1973 by the Texas Legislature.) Possibly, but not certainly, a federal search warrant would be authorized under Hayden to search for and seize (by photograph) the screw holes and the chain fittings used to secure the plywood table in place. However, under Texas law, as noted, no search warrant could be issued to obtain the type of evidence secured here. Nevertheless, this negative factor does not vitiate the evidence obtained by the table top-room fittings comparison.

The Securing of The Table Top Corro-

boration Evidence Was Proper Under The Circumstance Existing In This Case.

1. There Was No Search -- The Table Top-Fittings Comparison Is Sustainable Because It Was Within Plain View

The officers in this case were lawfully on Petitioner's premises by virtue of a valid search warrant to search for a portion of rope that could possibly be identified as the remaining portion of the rope used to bind the victim within the sleeping bag. While lawfully on the premises, the officers were entitled to observe all within plain view including the brother's room with its tabletop fittings and to obtain the evidence within "plain view" by means of photographs even though the evidence so obtained was not described in the search warrant. Harris v. United States, 390 U.S. 234 (1968); Warden v. Hayden, supra. (The requirement that any plain view evidence must be happened upon inadvertently, as stated in Coolige v. New Hampshire, 403 U.S. 469 (1971), only involves a situation where the officers are on premises without a search warrant).

2. If The Table-Top Fittings Comparison Be Deemed A Search, Then Such Search Was Reasonable Under The Circumstances

Should the comparison of the table top with its wall and ceiling fittings be construed to be a search and the photographing of the table in place be held to be a seizure, this search and seizure is not unreasonable by Fourth Amendment standards.

The Fourth Amendment reads (when broken down intoits two clauses):

(1) "The right of the people to,be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and
(2) "No warrants, shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

First, notice is again made that the officers were on the premises by virtue of a valid search warrant -- to look for rope. The intrusion upon privacy was an accomplished fact with the service of the warrant. Little more invasion of privacy was occasioned by the table top experiment.

Second, the premises involved were the scene of a crime of violence as revealed by Petitioner's own words. Can it be said to be unreasonable for the police to investigate the scene of the crime?

Third, all the circumstances point to the reasonable conduct of the officers in obtaining the table top comparison. If the table fitted properly, material evidence was obtained to be used against Petitioner. However, if the table failed to fit, all of Petitioner's statement would have been suspect and additional investigation of other persons would have been made, a possible benefit to Petitioner.

The search and seizure here (if such it be) is easily sustainable under the first clause of the Fourth Amendment which prohibits only unreasonable searches. If the test be only one of "reasonableness", then the search here passes with flying colors.

This Court has stated in Carroll v. United States, 276 U.S. 132, 147:

> "The Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable."

In Cady v. Dombrowski, _____ U.S. _____, 93 S. Ct. 2523, 2527 (1973), it was stated:

> "The ultimate standard set forth in the Fourth Amendment is reasonableness." (Emphasis added.)

Applying the foregoing standards to the present case, the table top-fittings search was constitutionally sound.

CONCLUSION

For the reasons advanced above, Respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, do hereby certify that a copy of the above and foregoing Respondent's Brief in Opposition has been served by placing the same in the United States Mail, postage prepaid, certified, on this _____ day of _____, 1974, addressed as follows: Emmett Colvin, Attorney at Law, 1100 Adolphus Tower, Dallas, Texas 75202.

LONNY F. ZWIENER
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